Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-822

ERNEST FRY AND THELMA BOEHM,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

REPLY BRIEF OF ERNEST FRY AND THELMA BOEHM

LUCAS, PRENDERGAST, ALBRIGHT, GIBSON, BROWN & NEWMAN
By JOHN A. BROWN
42 East Gay Street
Columbus, Ohio 43215
Attorneys for Ernest Fry and Thelma Boehm

ROBERT BORK
Solicitor General
United States Department of Justice
Washington, D.C.
Attorney for Respondent

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43215

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PRESENT POSTURE OF CASE

The issues, the Constitutional provisions, the pertinent statutes, and the jurisdiction of this Court are adequately explained in the original brief of the Petitioners and the answer brief of the United States. We don't intend to replow the same ground we were over in our original brief, but do intend to reply to the answer brief of the United States. The fact that the government's brief was not filed until the middle of September, 1974, gives us pause. Certiorari was granted in this case by this Court on February 19, 1974. Our brief was filed timely within the limits fixed by this Court. The United States had from February 19, 1974, to prepare their brief in response. We did not object to the original continuance requested by the United States Department of Justice, but we did object to the second continuance requested. Nevertheless, this Court allowed a second continuance which placed the responsibility on the United States to file its brief by August 14, 1974. August 14th came and

went, and the brief of the United States was finally filed on September 20, 1974. We suppose there is very little we can do other than to complain to no avail that the brief was one month late. Nevertheless, we want to point out to the Court that the United States did not follow the direction of this Court in filing timely.

QUESTIONS PRESENTED TO THIS COURT BY PETITIONERS BRIEF AND BRIEF OF THE UNITED STATES

1. THE WRIT OF CERTIORARI SHOULD NOW BE DISMISSED BECAUSE THE QUESTION PRESENTED HAS NO CONTINUING IMPORTANCE.

2. WHETHER WAGE CONTROLS PROMULGATED UNDER THE ECONOMIC STABILIZATION ACT OF 1970, MAY CONSTITUTIONALLY BE APPLIED TO THE EMPLOYEES OF STATE GOVERNMENT.

ARGUMENT AND LAW

The Writ of Certiorari allegedly should be dismissed because the question presented is no longer of continuing importance.

The United States continues to insist that this matter is no longer important, if it ever was, and should now be dismissed because the Economic Stabilization Act expired on April 30, 1974. The government ignores the decision of the Temporary Emergency Court of Appeals in *United States v. California*, ___F. 2d ____, September 19, 1974, in which the Temporary Emergency Court of Appeals dismissed an injunction obtained by the United States in California. Perhaps it should have been no surprise that the United States has filed a Petition for

Writ of Certiorari in that case with this Court. It seems anomalous to us that the United States would argue on the one hand that because the Economic Stabilization Act has expired, that this Writ should be dismissed, and is of no continuing importance, and on the other hand filing a Petition of their own in a case almost exactly like this one. We repeat what we said earlier, that this case involves more than potentially $100,000,000.00 and no abstract or hypothetical issue is presented. The case of *United States v. Constantine*, 296 U.S. 287, 80 L. Ed. 233 (1935), would seem completely dispositive of the arguments raised by the United States. It might be well if the Solicitor General of the United States could explain to the employees of Ohio and California, that it is no longer of any importance whether or not these employees would be paid approximately $100,000,000.00. This might be difficult to do. We and the *amici* urge that this Court retain the jurisdiction it asserted last February, 1974, in which it decided that this case was one of importance to many persons and, if anything, that decision by this Court has been emphasized by what has occurred since then.

2. WHETHER WAGE CONTROLS PROMULGATED UNDER THE ECONOMIC STABILIZATION ACT OF 1970, MAY CONSTITUTIONALLY BE APPLIED TO THE EMPLOYEES OF STATE GOVERNMENT.

The Case of *Maryland v. Wirtz*, 392 U.S. 183, has been cited time and time again by all parties, and the *amici* in this proceeding. Apparently the United States has not read the dissent in that case at all. Even the majority opinion at page 197 says,

> ". . . . that the power to regulate commerce, though broad indeed, has limits."

The dissent in *Maryland v. Wirtz, supra.*, goes much further when it says:

> "But what is done here is nonetheless such a serious invasion of state sovereignty protected by the Tenth Amendment that it is in my view not consistent with our constitutional federalism."

The dissent goes further to question:

> "Could the Congress virtually draw up each State's budget to avoid 'disruptive effect[s] * * * on commercial intercourse.'?"

The dissent goes on:

> "If all this can be done, then National Government could devour the essentials of state sovereignty, though that sovereignty is attested by the Tenth Amendment."

This Court has repeatedly emphasized that there are limits pursuant to the Tenth Amendment to the power of the United States under the Commerce Clause and we maintain that those limits have been reached and overreached in this matter. Judge Stanley Mosk, in *Coan v. State of California*, 11 Cal. 3d 286, (1974) stated it very well when he emphasized that the Tenth Amendment had meaning and the federal government had overreached itself.

CONCLUSION

We repeat that the federal government has shown by its own actions that this case is still most important and this Court should act on the issues presented to it and that the Tenth Amendment to the United States Constitution prevents the Economic Stabilization Act from applying to the State.

Respectfully submitted,

LUCAS, PRENDERGAST, ALBRIGHT, GIBSON, BROWN, & NEWMAN

By John A. Brown
JOHN A. BROWN
42 East Gay Street
Columbus, Ohio 43215
Phone No. (614) 228-5711
Attorneys for Ernest Fry and Thelma Boehm

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing reply brief of Ernest Fry and Thelma Boehm has been served upon the Solicitor General of the United States, Robert Bork, by mailing a copy to him at his office, the Department of Justice, Washington, D. C., this 5th day of November, 1974.

John A. Brown
JOHN A. BROWN